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COMMENTS OF GOVERNMENTS 1/ ON THE REPORT OF THE WORKING GROUP ON THE QUESTION OF AN INTERNATIONAL CRIMINAL JURISDICTION 2/

Addendum

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1/ Submitted further to paragraph 5 of General Assembly resolution 47/33 of 25 November 1992. References to the question of an international criminal jurisdiction are also to be found in document A/CN.4/448 and Add.1 reproducing the comments and observations submitted by Governments on the draft code of crimes against the peace and security of mankind adopted on first reading by the Commission at its forty-third session.

2/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10/A/47/10, annex.

BELARUS

[Original: Russian]
[19 May 1993]

1. The competent bodies of the Republic of Belarus (Ministry of Justice etc.) look upon the idea of the creation of an international criminal court (ICC) as an extremely promising one.
2. Arising from an analysis of the various categories of crimes and of the various components of such crimes, the competent bodies of the Republic of Belarus support the view that different models of international criminal jurisdiction are needed for different purposes. In their opinion, an ICC may be more or less essential depending on the situation; specifically, it may be either the only possible means or merely an additional means of conducting a criminal trial. They consider that the ICC should be created mainly to administer justice in respect of crimes of an international character.
3. In connection with the fact that a highly developed body of substantive international criminal law is already in existence, the creation of an international criminal court ought not to be closely bound up with the adoption of the code of crimes against the peace and security of mankind, should it be a protracted process. In such a case, the crimes within the competence of the Court might initially be those defined by international treaties in force. After its adoption the code could become one of the international instruments defining crimes within the competence of the ICC. It would be logical to link participation in the code strictly with participation in the statute of the ICC. The opposite correlation might initially not be so strict, although it is to be hoped that the international community will arrive in the long-term at the position of regarding the code as mandatory for all States without exception.
4. In the opinion of the competent bodies of the Republic of Belarus, the international criminal court should initially have mixed competence in relation to international crimes. The crimes within the exclusive competence of the ICC should initially include aggression, the threat of aggression, systematic and mass violations of human rights, genocide and apartheid. Being a party to the statute of the court should automatically entail recognition of the exclusive competence of the ICC in relation to these international crimes. In addition, provision could be made for the sphere of the exclusive competence of the court to be broadened for individual States by means of declarations or agreements with the ICC. Other international crimes could temporarily fall within the sphere of the competing competence of the ICC and national courts. They would not thereby lose their characteristics as international crimes, although after the court had been in existence for a sufficient time the qualification of an act as an international crime could be linked to its inclusion in the sphere of the exclusive competence of the ICC. With respect to crimes of an international nature (general criminal offences with an international element having serious consequences for international relations) only optional jurisdiction might be established. In that case the ICC might be merely an alternative to the existing system of universal jurisdiction.

5. The personal jurisdiction of the international criminal court with respect to the range of persons within its competence would have to be universal, i.e. would have to extend to all persons with respect to whom its jurisdiction could be legally established (the transfer by a State party to the statute of the ICC of such persons, their extradition by a State that is not a party, and their arrest as a result of measures to maintain international peace and security taken in accordance with the United Nations Charter). Accordingly, no agreement with the jurisdiction of the court will be required. This should apply to crimes within the exclusive competence of the ICC. An optional element should exist in relation to crimes that are not within the mandatory jurisdiction of the court, i.e. there should be dependence on the agreement of the State (several States) competent by virtue of existing international law and national law. Failure to comply with the provisions on the mandatory jurisdiction of the ICC should be regarded as a threat to international peace and security and should entail the adoption by the United Nations Security Council of appropriate measures following the submission to it of the report of the international investigative body.

6. Organization of the other links in international criminal justice, in the first instance an international investigative body, is of great importance in connection with the creation of an ICC. It should be emphasized that the need for such a body to exist is long overdue, not only in connection with the creation of a court. In the opinion of the competent bodies of the Republic of Belarus the establishment of an independent prosecuting body would be inappropriate in the initial phase of the existence of the ICC and what could be discussed would be an independent prosecutor designated for each specific case by the court from a previously compiled list of candidates. The role of the prosecutor may not include investigation, the collection of evidence and its submission to the court. That is the role of the investigative body. The prosecutor ought to prepare the indictment and appear as the prosecutor in the trial, relying in the first instance on the information gathered by the investigative body. Only the court has the right to reject unfounded accusations in the course of the hearing.

7. The point of view that the statute of the ICC should take the form of an international treaty is worth support. The United Nations could give active assistance in its elaboration and adoption. Close interaction with the United Nations, which will require the fairly broad participation of States in the statute of the court, could condition the effectiveness of the ICC. Obviously, the basic interaction between the ICC and the United Nations will take the course of contact between the Security Council and the court on matters concerning the transfer to the ICC of cases involving aggression or the threat of aggression, the carrying out of the decisions of the court concerning the appearance of accused persons, and the execution of judgements. The link between the court and the United Nations and, in particular, the Security Council, might initially be an informal one of an ad hoc nature, and matters of an administrative and budgetary order could be settled on the basis of a special agreement between them.

8. In the opinion of the competent bodies of the Republic of Belarus, the circle of those entitled to appeal to the court would have to be fairly broad from its very inception and continuously extended. States not parties to the statute of the court should be allowed to appeal to the ICC in cases in which an accused person is under their jurisdiction, provided that these States recognize the obligatory nature of the statute for the case in question. The United Nations Security Council should also certainly have the right to appeal to the court.

9. The International Criminal Court would have to be a permanent body, which presupposes the existence of a previously established machinery and the permanent composition of its members. What might be discussed would be a system in which each State party to the statute of the court would designate a qualified specialist for a prescribed term to act as a judge. The judges, in their turn, would elect the president of the court and, possibly, the bureau of the court. When the court was required to act the bureau would select the composition of the court (5-7 judges) in the light of the established criteria. It is to be hoped that, as the number of cases increased, the court would in fact be converted into a permanently functioning international body.

10. As regards the law applicable to the ICC, the applicable procedural law (standards concerning the rights of the accused and procedure) should be created along with the court itself, while the applicable substantive law will require the inclusion of an exhaustive list of specific international treaties defining the crimes subject to jurisdiction. The general regulations on applicable law should necessarily include a reference to the principal sources (contractual and customary) and could refer to auxiliary sources. The latter also include national law, the use of which by the court should be sanctioned by an international legal standard.

11. The competent bodies of the Republic of Belarus have a number of specific comments on some of the points in the report of the working group. Ways of solving the question of the competence of the court regarding personal jurisdiction with respect to crimes within the optional competence of the ICC would obviously have to be worked out before the adoption of the code. These options (see para. 458 of the report) should be based on provisions concerning the jurisdiction of existing international treaties. We have doubts regarding the use in paragraph 501 of the report of the term "secondary law" in relation to resolutions of the bodies of international organizations. The basis for their inclusion in applicable law should be that they are additional sources of international law facilitating the application of international agreements and usages. The solution proposed in paragraph 502 of the report concerning the definition of the penalties to be imposed may be regarded as a temporary solution until the adoption of the code of crimes against the peace and security of mankind. In connection with paragraphs 521-527 of the report, it must be emphasized that in relation to crimes within the competence of the ICC the reference should be to the mandatory transfer of accused persons. Consideration may be given to the question of a reservation concerning non-use of the death penalty in the case of the transfer of an accused person by a State in which the use of such a punishment measure has been totally rejected. In connection with paragraph 531 of the report it may be commented that the

statute of the court could include a general provision supplemented by a non-exclusive list of matters with respect to which judicial assistance could be sought, with an indication of the procedure for carrying out commissions. In the long term a full-scale treaty on judicial assistance could be drafted as an annex to the statute of the ICC. How the implementation of sentences is organized will be largely dependent on the number of persons convicted by the verdicts of the court. In the first phase provision will evidently have to be made for the sentence to be served in the complaining State, and the serving of the sentence must be subject to monitoring by the court (by a representative of the bureau).

12. In the opinion of the competent bodies of the Republic of Belarus, the ICC, as outlined in the report, is a minimalistic and fairly flexible concept. Understatement of the characteristics of international criminal jurisprudence envisaged in it may lead to the creation of an ineffective mechanism. What the international community needs, as is shown by practise, is, on the contrary, a really effective mechanism.

SPAIN

[Original: Spanish]
[19 May 1993]

1. The Spanish Government is firmly in favour of the establishment of an international court with general jurisdiction to punish international crimes. The Spanish Government takes the view that such a court can make up for the consequences of international crimes and also believes that its mere existence will be unquestionably important as a deterrent. It therefore endorses the main ideas in the report by the Commission's Working Group, and particularly the keynote of prudence, flexibility and gradualism.

2. The most appropriate legal basis for establishing the court is a treaty open to universal participation, negotiated and concluded in the United Nations, a framework which would make the new court highly representative and impart to it the political and moral authority of the United Nations.

3. Initially, at least, the criminal court should not be a standing full-time body. It would seem preferable, in the beginning, for the court's statute to create simply a straightforward, streamlined and inexpensive mechanism for the administration of justice in each concrete case, as required. However, after the new court's activities have been assessed in the light of reality, a step could be taken towards a standing full-time body.

4. In the first phase, at least, the new court's jurisdiction should not be compulsory. This means that a State's acceptance of the jurisdiction of the court would depend on an ad hoc document, different and separate from that State's expression of consent in being bound by a treaty.

5. As to jurisdiction *ratione personae*, initially the court should only have jurisdiction to punish international crimes committed by individuals. Punishment for international crimes perpetrated by States involves highly complex legal and political problems and the question of assigning this function to the court should be left for later.

6. As to jurisdiction *ratione materiae*, the need to observe the principle nullum crimen sine lege means that the only international crimes that can be punished are the ones regarded as such by general international law at the time they are committed. The actual substance of international law in this matter would be determined by those conventions and treaties that unquestionably express the *opinio juris* of the international community.
